A

CHANG YUN TAI & ORS

v.

HSBC BANK (M) BHD & OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
HISHAMUDIN MOHD YUNUS JCA
JEFFREY TAN JCA
[CIVIL APPEAL NOS: W-02-561-2008,
C W-02-562-08 & W-02-563-08]
30 MARCH 2011

CIVIL PROCEDURE: *Striking out - Statement of claim - Claim seeking to declare bank loan agreement null and void because of alleged*
D *irregularities in sale and purchase agreement - Whether claim seeking to prevent bank from enforcing rights under loan agreement - Whether loan agreement affected by irregularities in sale and purchase agreement - Whether claim disclosing reasonable cause of action - Whether appeal against striking out allowed - Rules of the High Court 1980, O. 18 r.*
E *19(1)(a)*

BANKING: *Loan agreement - Validity of - Whether irregularities in sale and purchase agreement affecting validity of loan agreement - Whether bank estopped from enforcing rights under loan agreement*

F The appellants, all 178 of them herein, were purchasers of apartments in a housing development project known as Bandar Universiti Teknologi Legenda ('BUTL project'). The BUTL project was a joint-venture project entered into between the relevant local authority as landowner and the housing developer concerned. For
G the purpose of the joint venture project, a power of attorney ('PA') was executed by the local authority in favour of the housing developer. The respondents herein were amongst other financial institutions that granted the appellants loans to finance their purchases. In the High Court, the appellants as plaintiffs brought
H an action against 21 others as defendants in which the respondents were the 14th, 17th and 18th defendants. The appellants in their statement of claim challenged the validity of the sale and purchase agreements ('SPAs') entered into between the appellants and the housing developer (the 1st defendant in the
I High Court) as a result of which they claimed that the loan cum assignment agreements ('loan agreements') with the respondents

were rendered null and void. Accordingly, the respondents were prevented from enforcing the loan agreements against the appellants. The respondents successfully applied to strike out the appellants' claim against them pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 on the grounds that the statement of claim did not disclose any reasonable cause of action. The appellants now appealed to this court in three separate appeals against the striking out of their claim against the three respondents. The parties agreed that the outcome of appeal no. W-02-561-08 would bind the other two appeals, *ie*, W-02-562-08 and W-02-563-08.

The appellants submitted, *inter alia*, that (i) the PA executed by the local authority in favour of the housing developer was insufficient in law for the various reasons given in their statement of claim, amongst others, that the PA was not duly authenticated or attested within sub-ss. 3(1) and (2) of the Powers of Attorney Act 1949; (ii) the PA amounted to a sale or an alienation of the lands by the local authority to the housing developer as the local authority did not obtain the consent of the State Authority as required under proviso (i) to s. 101(r) of the Local Government Act 1976; (iii) by providing the end financing in the aforesaid circumstances, the respondent had breached the banking laws and banking licences under which it operated; (iv) the sale of apartments on a Guaranteed Return Scheme (GRS) was illegal under s. 94 of the Companies Act 1965 and contrary to public policy; and (v) the respondent as financier was expected to have known the aforesaid and owed of duty of care to the appellants with regards to providing the end financing on the fact that the respondent had endorsed the development of the project.

Held (dismissing the appeal)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) The granting of the PA could not amount to alienation or a sale of lands by the local authority to the housing developer. In the first place, the rights conferred by the local authority to the housing developer under the PA were not known since the particulars as to the contents of it were not pleaded in the statement of claim. (para 20)

(2) The appellants' allegation that the PA was not duly authenticated or attested within s. 3(1) and (2) of the Powers of Attorney Act 1949 was vague in that the statement of claim did not state in what way the section was not complied with, regardless that the issue of authentication could not have any bearing on the validity of the SPAs and the loan agreements between the appellants and the respondent. (para 22)

(3) The GRS agreements were separate contracts from the SPAs and were made between the appellants and the 4th defendant of the High Court proceedings which was not a party to the appeal herein. Further, the statement of claim was vague and did not explain in what manner the GRS contravened the Companies Act 1965. Even if the GRS contravened the said Act, it was not invalid by virtue of the saving provision under s. 94(2) of the same Act. Moreover, the issue about the validity of the GRS was irrelevant to the issue as to whether the loan agreement between the appellants and the respondent was valid. (paras 26 & 27)

(4) The appellants must first repay the money that had been disbursed to them by the respondent as they were seeking an equitable relief against the respondent from whom they had obtained a loan to rescind or nullify the loan agreement. There was no averment to that effect in their statement of claim that they were in a position to offer *restitution in integrum*. (para 28)

(5) The illegality, if any, of the SPAs did not in any way taint the end financing agreements. There was a fallacy in the appellants' argument that the end financing agreements were subsidiary to the SPAs. The end financing agreements were independent and separate contracts from the SPAs. Under the SPAs, the appellants had an obligation to pay the purchase price to the developer, whereas under the end financing agreements they had a legal obligation to repay to the respondent the monies borrowed. Both were primary instruments on their own involving different parties. The respondent did no more than to lend the money as requested by the appellants. (para 29)

(6) The appellants' alleged causes of action against the respondent was not premised on any clear and specific act of impropriety on the part of the respondent in granting the loans to the appellants but merely on a vague assertion that the respondent was expected to know of the alleged irregularities committed by the local authority and the developer – and consequently, the respondent should be stopped from exercising its rights under the loan agreements. It went against good reason and common sense to find a cause of action based purely on the assertion that the banks were expected to know of such irregularities and should therefore be stopped from enforcing their rights under the loan agreements. There would be chaos in the commercial sector if such arguments were to be accepted. It was unjust and impractical to expect every financial institution in the country to closely and critically examine the joint venture agreement, the sale and purchase agreement and every related instrument to ensure that no law had been breached, either by the developer or the landowner, before the grant of a loan to the purchaser. (para 30)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu, kesemua 178 mereka di sini, adalah pembeli-pembeli apartmen di sebuah projek perumahan yang dikenali sebagai Bandar Universiti Teknologi Legenda ('projek BUTL'). Projek BUTL adalah projek usahasama antara majlis tempatan yang berkenaan sebagai pemilik tanah dan pemaju terbabit. Bagi maksud projek usahasama, satu surat kuasa wakil ('PA') telah dimeterai oleh majlis tempatan untuk manfaat pemaju. Responden-responden di sini adalah antara institusi kewangan yang memberi pinjaman kepada perayu-perayu bagi membiayai pembelian mereka. Di Mahkamah Tinggi, perayu-perayu sebagai plaintif-plaintif telah memulakan tindakan terhadap 21 defendan-defendan di mana responden-responden adalah defendan ke 14, 17 dan 18 masing-masingnya. Perayu-perayu melalui penyata tuntutan mereka telah mencabar kesahan perjanjian jual beli ('SPAs') yang mereka meterai dengan pemaju perumahan (defendan pertama di Mahkamah Tinggi), dan selanjutnya mendakwa bahawa perjanjian-perjanjian pinjaman dan serahhak ('perjanjian pinjaman') yang dimeterai dengan responden-responden adalah batal dan tak sah. Ini bermakna bahawa responden-responden dihalang dari menguatkuasakan perjanjian pinjaman. Apapun, responden-

responden telah berjaya membatalkan tuntutan perayu-perayu terhadap mereka di bawah A. 18 k. 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan bahawa penyata tuntutan tidak mendedahkan sebarang kausa yang munasabah. Perayu-perayu kini merayu ke mahkamah semasa melalui tiga rayuan berasingan berkaitan pembatalan tuntutan mereka terhadap ketiga-tiga responden. Pihak-pihak bersetuju bahawa keputusan di dalam rayuan no. W-02-561-08 akan mengikat dua rayuan yang lain, iaitu rayuan-rayuan no. W-02-562-08 dan no. W-02-563-08.

Perayu-perayu antara lain berhujah bahawa (i) PA yang dimeterai oleh majlis tempatan untuk manfaat pemaju perumahan cacat di sisi undang-undang atas alasan-alasan yang dinyatakan dalam penyata tuntutan mereka, termasuk bahawa PA tidak dibuat dan disaksikan mengikut kehendak sub-s. 3(1) dan (2) Akta Surat Kuasa Wakil 1949; (ii) PA adalah berbentuk penjualan atau pemberian milik tanah oleh majlis tempatan kepada pemaju perumahan disebabkan majlis tempatan tidak memperoleh persetujuan Kerajaan Negeri seperti yang dikehendaki oleh proviso (i) kepada s. 101(r) Akta Kerajaan Tempatan 1976; (iii) responden, dalam memberi end financing dalam halkeadaan yang wujud, telah melanggari undang-undang dan lesen perbankan yang mengawali operasinya; (iv) penjualan apartmen yang berdasarkan Skim Jaminan Pulangan (GRS) adalah tak sah di bawah s. 94 Akta Syarikat 1965 dan bertentangan dengan polisi awam; dan (v) responden selaku pembiaya seharusnya mengetahui perkara-perkara di atas dan memikul tanggungjawab untuk berjaga-jaga kepada perayu-perayu berkaitan dengan pemberian end financing.

Diputuskan (menolak rayuan)

Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Pemberian PA bukan suatu pemberian milikan atau penjualan tanah oleh majlis tempatan kepada pemaju perumahan. Terutama, apabila hak-hak yang diberikan oleh majlis tempatan kepada pemaju perumahan di bawah PA tidak diketahui, disebabkan butiran-butiran berkaitan kandungannya tidak diplidkan dalam penyata tuntutan.

(2) Dakwaan perayu-perayu bahawa PA tidak disahkan atau disaksikan seperti maksud s. 3(1) dan (2) Akta Kuasa Wakil 1949 adalah kabur dalam ertikata penyata tuntutan tidak

menyatakan dengan cara apa seksyen tersebut tidak dipatuhi, walaupun isu pengesahan sama sekali tidak mempengaruhi kesahan SPAs serta perjanjian pinjaman antara perayu-perayu dan responden.

(3) Perjanjian GRS adalah kontrak yang berasingan dari SPAs dan dibuat dengan defendan ke empat dalam prosiding di Mahkamah Tinggi yang bukan merupakan pihak kepada rayuan di sini. Selain itu, penyata tuntutan juga kabur dan tidak menjelaskan bagaimanakah GRS dikatakan telah melanggari Akta Syarikat 1965. Jika pun GRS melanggari Akta tersebut, ia tidak menjadikannya tak sah disebabkan oleh peruntukan penyelamat di bawah s. 94(2) Akta yang sama. Selain itu, isu mengenai kesahan GRS tidak relevan kepada isu sama ada perjanjian pinjaman antara perayu-perayu dan responden sah atau tidak.

(4) Bagi membatalkan perjanjian pinjaman, perayu-perayu mesti terlebih dahulu membayar balik wang yang telah dibayar kepada mereka oleh responden memandangkan mereka memohon relif berekuiti terhadap responden dari siapa mereka telah memperoleh pinjaman. Tiada pengataan mengenainya dalam penyata tuntutan mereka, iaitu bahawa mereka mampu menawarkan *restitution in integrum*.

(5) Ketaksahan SPAs, jika pun berlaku, tidak walau dalam apa cara sekalipun mengotori perjanjian end-financing. Terdapat salah tanggap pada hujah perayu-perayu bahawa perjanjian end financing adalah subsidiari kepada SPAs. Perjanjian end financing adalah merupakan kontrak-kontrak yang berasingan dan bebas dari SPAs. Di bawah SPAs, perayu-perayu mempunyai obligasi untuk membayar harga belian kepada pemaju, sementara di bawah perjanjian end financing mereka mempunyai tanggungan untuk membayar semula kepada responden wang yang dipinjam. Kedua-duanya merupakan instrumen utama yang melibatkan pihak-pihak yang berbeza. Responden hanya memberikan pinjaman kewangan seperti yang dipohon oleh perayu-perayu, tidak lebih dari itu.

(6) Kausa tindakan perayu-perayu yang dikatakan terhadap responden tidak bergantung kepada mana-mana perbuatan tidak teratur yang spesifik dan jelas di pihak responden dalam memberi pinjaman kepada perayu-perayu, tetapi hanya

berasaskan kepada pengataan kabur bahawa responden seharusnya mengetahui mengenai ketakteraturan-ketakteraturan yang didakwa dilakukan oleh majlis tempatan dan pemaju – dan kerana itu – seharusnya dihalang dari melaksanakan hak-haknya di bawah perjanjian-perjanjian pinjaman. Adalah bertentangan dengan akal budi dan kebiasaan untuk mengasaskan kausa tindakan semata-mata atas pengataan bahawa bank harus mengetahui ketakteraturan-ketakteraturan sedemikian dan oleh itu perlu dihalang dari menguatkuasakan hak-hak mereka di bawah perjanjian-perjanjian pinjaman. Sektor perdagangan akan menjadi kucar kacir jika hujah sebegini dibenarkan. Adalah tidak adil dan tidak praktikal untuk mengharapkan setiap institusi kewangan di negara ini untuk memeriksa dengan rapi dan kritikal perjanjian usahasama, perjanjian jual beli dan setiap instrumen yang terlibat bagi memastikan bahawa tiada undang-undang telah dilanggari, sama ada oleh pemaju mahupun tuan tanah, sebelum memberikan pinjaman kepada pembeli.

Case(s) referred to:

Baranick v. Counsel Trust Co [1994] ACWSJ LEXIS 67480 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Interveners) [1996] 4 CLJ 52 HC ***(dist)***

Legislation referred to:

Companies Act 1965, ss. 84, 89, 94(2)

Local Government Act 1976, s. 101

Powers of Attorney Act 1949, s. 3(1), (2)

Rules of the High Court 1980, O. 18 r. 19(1)(a)

For the appellants in the three appeals - Malik Imtiaz Sarwar (M Lavendran with him); M/s Ngeow & Tan

For the respondents in the three appeals - Benjamin John Dawson (Elaine Choong with him); M/s Benjamin Dawson

[Appeal from High Court, Kuala Lumpur; Suit No: D8-22-1498-2005]

[Editor's note: For the High Court judgment, please see Chang Yun Tai & Ors v. Dataran Mantin Sdn Bhd & Ors [2009] 1 LNS 1757.]

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This appeal was called up together with two other related appeals, namely:

(3) Civil Appeal No. W-02-562-08; and

(4) Civil Appeal No. W-02-563-08.

[2] In Civil Appeal No. W-02-562-08, the appellants are the same as the appellants in the present appeal but the respondent is Alliance Bank Berhad (Alliance Bank), who is the 14th defendant in the proceedings in the High Court.

[3] In Civil Appeal No. W-02-563-08, the appellants are also the same as the appellants in the present appeal but the respondent is Malayan Banking Berhad (Maybank), who is the 18th defendant in the proceedings in the High Court.

[4] The respondent in the present appeal (W-02-561-08), HSBC Bank (M) Berhad, is the 17th defendant in the High Court proceedings (hereinafter shall be referred to as the 'respondent' or 'defendant' or 'HSBC bank').

[5] At the commencement of the hearing of the appeals before us, on the suggestion by the court, it was agreed by all counsel representing the parties concerned that only the present appeal be heard and that, for the two other appeals, parties would bound by the outcome of the present appeal.

[6] All in all there are 21 parties cited as defendants in the High Court proceedings. Fourteen of them are financial institutions including the respondent and the other two banks (Alliance Bank and Maybank) that we have earlier named. But the present three appeals are only concerned with the three financial institutions (HSBC Bank, Alliance Bank and Maybank).

[7] Before the High Court, the respondent in this appeal, together with the other two respondents that we have mentioned, had separately applied to strike out the appellants'/plaintiffs' claim against them pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 on the grounds that the statement of claim does not disclose any reasonable cause of action against them. The

learned High Court Judge granted the striking out applications. The appellants/plaintiffs are dissatisfied with the decision of the learned judge. The appellants/plaintiffs filed three separate appeals against that decision. Hence, the three appeals that are now before us.

[8] We have unanimously dismissed the appeal (Civil Appeal W-02-561-08) with costs. We shall now give our grounds.

[9] We agree with the finding of the learned High Court Judge that the statement of claim does not disclose any reasonable cause of action against the respondent and hence the statement of claim ought to be struck off and the action against the respondent be dismissed.

[10] All the 178 appellants (the plaintiffs in the High Court) in the present appeal are purchasers of apartments in a project known as Bandar Universiti Teknologi Legenda. The apartments were built by the 1st defendant company (not a party in any of the three appeals), Dataran Mantin Sdn Bhd, the developer of the project. The plaintiffs had obtained end financings from the 14 financial institutions cited as defendants in the High Court proceedings. The respondent together with Alliance Bank and Maybank are among the financial institutions that have been cited as the defendants. The plaintiffs, as purchasers, had entered into the respective loan cum assignment agreements with the 14 financial institutions.

[11] The construction of the apartments had been completed by the developer. The borrowed sums under the loan cum assignment agreements had been fully disbursed by the 14 financial institutions (including the respondent). And the apartments had been occupied by the respective purchasers (the appellants/plaintiffs).

[12] The 7th defendant in the High Court proceedings, Majlis Perbandaran Nilai (not a party in any of the three appeals), is the local government authority responsible for the administration of the area within which the project is situated. The 7th defendant was at all material times the owner of the lands involved in the project. For the purpose of the project, the 7th defendant (as the landowner) and the 1st defendant (as the developer) entered into a joint-venture to develop the lands. For the purpose of the joint-venture project, a power of attorney was executed by the 7th defendant in favour of the 1st defendant.

[13] The plaintiffs' alleged causes of action against the defendants are numerous, namely: A

(a) fraudulent misrepresentation;

(b) negligence; B

(c) conspiracy to injure; and

(d) unjust enrichment.

[14] In this appeal, however, we are not concerned with the above issues. C

[15] As against the financial institutions, including the respondent in this appeal, the plaintiffs' causes of action, as disclosed by the written and oral submissions, are confined only to the following. It is alleged in the statement of claim that the sale and purchase D agreements (the SPAs) entered into between the plaintiffs (as the purchasers) and the 1st defendant (as the developer/vendor) are null and void in law for being in contravention of the following laws, namely:

(a) the Powers of Attorney Act 1949; E

(b) the Local Government Act 1976; and

(c) the Companies Act 1965;

and, as a consequence, the end financing agreements (that is to say, the loan cum assignment agreements) which the plaintiffs entered into with the financial institutions (including the respondent), are also null and void and of no effect. The declaration sought in the High Court action against the G respondent and the financial institutions is to the effect that the end financing agreements are null and void and accordingly the financial institutions are estopped from enforcing the same.

[16] We shall now elaborate as to why we hold that the plaintiffs' statement of claim does not disclose any reasonable cause of action as against the respondent/defendant (HSBC Bank). H

[17] First, with regard to the allegation in paras. 30 to 34 of the statement of claim, we are not persuaded by the appellants' argument that the power of attorney executed by the Majlis I

Perbandaran Nilai (the 7th defendant) in favour of the 1st defendant (the developer) in any way offends proviso (i) of paragraph (r) of s. 101 of the Local Government Act.

[18] Paragraphs 30 to 34 state:

A. Power of Attorney

30. The 1st defendant carried out the following purportedly pursuant to a power of attorney executed by the 7th defendant in favour of the 1st defendant on 27.11.1992 (the "PA"):

30.1 executed all necessary documents as attorney for the 7th defendant in respect of the development of the lands;

30.2 executed all SPAs with the plaintiffs in respect of the development for itself as well as attorney for the 7th defendant;

30.3 executed all necessary documents as attorney for the 7th defendant for the purpose of raising bridging finance for the purposes of the development; and

30.4 executed all land dealings in relation of the lands on behalf of the 7th defendant in respect of the development.

31. Further to the foregoing, no officer of the 7th defendant executed any of the legal documentation relevant to any aspect of the development, ie, the BUTL project.

32. In this regard, the PA:

32.1 was purportedly deposited with the High Court of Malaya at Seremban and registered as 1126-92 by the registry of the Court;

32.2 was a power of attorney given by the 7th defendant expressed to be irrevocable in favour of the 1st defendant;

32.3 was not duly authenticated or attested within the meaning of sub-sections 3(1) and (2) of the Powers of Attorney Act 1949 (Revised 1990) (the "PA Act");

32.4 was not complete in that while:

a. reference was made to a purported Joint Venture Agreement, the date of the same was not specified. The agreement in question was therefore uncertain; and/or

b. the subject matter of the PA was uncertain as though reference was made to an annexure purportedly identifying the lands, no such annexure was annexed to the PA.

33. Further to the foregoing, the said PA amounted to a sale or an alienation of the Lands by the 7th defendant to the 1st defendant. In this regard:

33.1 the 7th defendant did not obtain the State Authority, in this case the Yang di-Pertuan Besar's consent as required under proviso (i) to section 101(r) of the Local Government Act;

33.2 the monies received by the 7th defendant from the sale or other alienation of property were not credited to a Local Authority Fund as required under proviso (ii) to section 101(r) of the Local Government Act.

34. In the view of the foregoing, the plaintiffs contend that the 7th defendant did not have the power in law to give the PA in favour of the 1st defendant under the Local Government Act, 1976 and subsidiary legislation. Further or in the alternative, the PA was, in any event, insufficient in law. The 1st defendant as such did not as a matter of law have the capacity to enter into the SPAs. The SPAs are as such void.

34.1 The banks were expected in law to know this as a matter of law and as such, all end financing agreements are similarly void as instruments arising out of, or otherwise connected with, the SPAs.

34.2 The banks were not in law empowered or authorized to act in any manner contrary to law. Providing end financing in these circumstances was a breach of banking laws and/or the licences under which the banks operated.

34.3 The endorsing banks were further under a duty of care to the plaintiffs with regard entering into the end financing relationships they did. This duty was founded on the fact of the banks having endorsed the development and having entered the end financing

A relationships in the circumstances set out above. The endorsing banks breached their duty of care for not having appraised the plaintiffs of the fact that the 7th defendant had no legal right to act through the 1st defendant and in the circumstances, and in any event, by reason of it being unconscionable, are estopped from asserting their rights under the end financing agreements in connection with the foregoing.

[19] Proviso (i) to paragraph (r) of s. 101 reads:

C **101. Further powers of local authority**

In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely:

D ...

(r) to sell, lease or otherwise dispose off any movable or immovable property of the local authority;

Provided that -

E (i) no sale or other alienation of immovable property shall take place without the consent of the State Authority;

[20] In the light of the above averments, we are in agreement with the submission of Mr. Benjamin Dawson, learned counsel for F the respondent (HSBC Bank), that the granting of the power of attorney does not amount to alienation or a sale of lands by the 7th defendant to the 1st defendant. In the first place, we have no idea as to what rights were conferred by the 7th defendant to the 1st defendant under the power of attorney as the particulars G as to the contents of the power of attorney are not pleaded in the statement of claim.

[21] Secondly, s. 3 of the Powers of Attorney Act 1949 stipulates:

H **Authentication of powers of attorney**

3(1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within Peninsular Malaysia unless:

I

(a) if executed within Peninsular Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by:

(i) a Magistrate;

(ii) a Justice of the Peace;

(iii) a Land Administrator;

(iv) a Notary Public;

(v) a Commissioner for Oaths;

(vi) an advocate and solicitor; or

(vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in Peninsular Malaysia and incorporated by or under any written law in force in Peninsular Malaysia; or

(b) if executed outside Peninsular Malaysia, the execution of such instrument is authenticated, in such form as may be accepted by the Registrar, by:

(i) a Notary Public;

(ii) a Commissioner for Oaths;

(iii) any Judge;

(iv) a Magistrate;

(v) a British Consul or Vice-Consul;

(vi) a representative of Her Britanic Majesty;

(vii) on and after Merdeka Day, any Consular Officer of Malaysia;

(viii) in the case of an instrument executed in the Kingdom of Saudi Arabia, the Malaysian Pilgrimage Commissioner; or

(ix) in the case of an instrument executed in the Republic of Singapore, an advocate and solicitor of the Supreme Court of the Republic; or an officer, acting in the course of his employment, of a company carrying on the business of banking in the Republic and incorporated by or under any written law of the Republic.

(2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any of the purposes for which a power of attorney may be used under any such written law.

[22] With respect to the allegation that the power of attorney was not duly authenticated or attested within the meaning of s. 3(1) and (2) of the Powers of Attorney Act 1949, in our view, the allegation is vague in that the averments in the statement of claim do not state in what way the section was not complied with. In any case, we are unable to see how this issue of authentication can have any bearing on the validity of the sale and purchase agreements, let alone the loan cum assignment agreements between the plaintiffs and the defendant (HSBC Bank).

[23] Thirdly, with regard to paras. 35, 36, 37 and 38 of the statement of claim, pertaining to the Guaranteed Return Scheme (the Scheme), the averments state:

C. Division 5, Companies Act, 1965

35. Further and in the alternative, the plaintiffs contend that:

35.1 the offer for sale of apartments in BUTL on the basis of a GRS scheme amounted in law to an issue or offer to the public for subscription or purchase or an invitation to the public to subscribe for or purchase any interest within the meaning of Division 5 of the Companies Act, 1965 (the "CA"); and

35.2 the purchase of units by the plaintiffs of the said apartments amounted in law to a purchase of an interest within the meaning of Division 5, CA.

36. The plaintiffs further contend the said offer and the subsequent sale of the plaintiffs were in contravention of Division 5, CA for the reasons that follow:

36.1 DM was and is not a public company;

36.2 No prospectus was issued in connection with the offer for sale of units in the development; and/or

36.3 No approved deed within the meaning of sections 85 and 86, CA was in force at any point in time. A

37. By reason of the foregoing, the offer of units and the consequentsale of units to the plaintiffs was void for being:

37.1 illegal in the light of such offer and sale being a criminal offence under section 94, CA; and/or B

37.2 contrary to public policy. In this regard:

a. the legislative aim underlying Division 5, CA was the protection of the investing public in schemes of this nature; C

b. the nature of the events that transpired and forming the foundation of the action herein were of the type of events that Division 5, CA was intended to safeguard against; D

c. the plaintiffs have suffered injury of the nature that Division 5, CA was intended to safeguard against.

38. As a consequence of the foregoing: E

38.1 the scheme was and is illegal;

38.2 further or alternatively, the scheme was contrary to public policy;

38.3 the banks were expected in law to know this as a matter of law. The matters set out in paragraphs 34.1 to 34.3 above are repeated herein but in the context of Division 5, CA. F

[24] Section 89 of the Companies Act provides: G

Interests to be issued by companies only

89. No person except a company or an agent of a company authorized in that behalf under the seal of the company shall issue or offer to the public for subscription or purchase or shall invite the public to subscribe for or purchase any interest. H

[25] For the purpose of Division 5 of the Companies Act, s. 84 of the Act defines 'company' and 'interest' as follows:

'company' means a public company, and includes a corporation that is a public company under the law of a proclaimed country and is registered as a foreign company in Malaysia; I

A 'interest' means any right to participate or interest, whether enforceable or not and whether actual, prospective or contingent:

(a) in any profits, assets or realization of any financial or business undertaking or scheme, whether in Malaysia or elsewhere;

B

(b) in any common enterprise whether in Malaysia or elsewhere, in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party;

C (c) in any time-sharing scheme; or

(d) in any investment contract,

[26] The Guaranteed Return Scheme Agreements are, in the first D place, separate contracts from the SPAs. They were made between the plaintiffs and the 4th defendant (not a party to any of the three appeals), Pantai Legenda Management Sdn Bhd (see para. 20.3 of the statement of claim). Paragraph 20.3 mentions vaguely about 'assured rentals' and makes reference to Annexure B of the statement of claim. But if we were to refer to the said E Annexure B we will observe that the said Annexure does not provide any information as to how the Scheme operates. Therefore the statement of claim does not explain in what manner the said Scheme offends the Companies Act. In any case, we are in F agreement with the submission of the learned counsel for the respondent that even assuming that the Scheme is in contravention of Chapter 5 of the Companies Act 1965 (in particular, s. 89), it is not invalid by reason of the saving provision under s. 94(2) of the same Act that states:

G **94. Penalty for contravention of Division, etc.**

(1) …

(2) A person shall not be relieved from any liability to any holder of an interest by reason of any contravention of, or H failure to comply with this Division.

[27] Further, we are of the opinion that this issue about the validity of the Scheme is irrelevant to the issue as to whether or not the loan cum assignment agreements between the plaintiffs/ I purchasers and the respondent are valid.

[28] Fourthly, it is a rule of equity that where a plaintiff is seeking an equitable relief against a bank from whom he has obtained a loan on the ground that the loan agreement is unlawful and therefore a nullity – as in the present case, where the plaintiffs are seeking a declaration to rescind or nullify the loan cum assignment agreements with HSBC Bank – he must first repay the money that had been disbursed to him to the bank. There must be an averment in his statement of claim to the effect that he is in a position to offer *restitutio in integrum*, that is to say, he must formally tender restitution (see the Ontario Court (General Division) case of *Baranick v. Counsel Trust Co.* [1994] ACWSJ LEXIS 67480). There is no such averment in the statement of claim in the present case.

[29] Fifthly, we are in agreement with Mr. Benjamin Dawson that the illegality, if any, of the sale and purchase agreements does not in any way taint the end financing agreements. We accept his contention that there is a fallacy in the plaintiffs' argument that the end financing agreements are subsidiary to the sale and purchase agreements. The end financing agreements are independent and separate contracts from the sale and purchase agreements. Under the sale and purchase agreements, the plaintiffs have an obligation to pay the purchase price to the developer; whereas under the financing agreements they have a legal obligation to repay to the defendant bank the monies borrowed. Both are primary instruments on their own involving different parties. The respondent bank did no more than to lend the money as requested by the plaintiffs. The plaintiffs, in support of their argument, rely on *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surain Singh & Ors (Interveners)* [1996] 4 CLJ 52. But, with respect, there, in that case, the facts are different.

[30] Finally, we just would like to add that, on a close examination of the statement of claim, the plaintiffs' alleged causes of action against the defendant (HSBC Bank) is premised not on any clear and specific act of impropriety on the part of the defendant in granting the loans to the plaintiffs but merely on a vague assertion that the defendant bank was 'expected to know' of the alleged irregularities committed by the Majlis Perbandaran Nilai and the developer, and consequently the respondent bank

should be estopped from exercising its rights under the loan cum assignment agreements (see para. 34 of the statement of claim). With respect, the plaintiffs' claim is contention far-fetched and devoid of any merit. We are in agreement with the learned High Court Judge that it is clearly repugnant to good reason and common sense to find a cause of action based purely on the assertion that the banks were expected to know of those alleged irregularities and should therefore be estopped from enforcing their rights under the loan agreements. In our view, there will be chaos in the commercial sector if we were to accept the plaintiffs' argument. It is unjust and impractical to expect every financial institution in this country, in considering whether or not to grant end financing to a purchaser of a property (such as a house or apartment), constructed pursuant to a joint venture, to closely and critically examine the joint-venture agreement, the sale and purchase agreement and every related instruments (for example, a power of attorney) to ensure that no law had been breached either by the developer or the landowner before it could grant a loan to the said purchaser.

[31] As we have stated earlier at the beginning of this judgment, the appeal is dismissed and that our decision in this appeal binds the other two appeals.

[32] We award costs in the sum of RM9,000 to the respondents in respect of the three appeals (that is to say, RM3,000 for each appeal).

[Appeals dismissed with costs.]